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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEROY VASSER,

Defendant and Appellant.

H045603

(Santa Clara County

Super. Ct. No. C1758839)

Defendant Robert Leroy Vasser pleaded no contest to five counts: possession of heroin for sale; transportation of heroin; possession of methamphetamine for sale; transportation of methamphetamine; and driving with a suspended license. He also admitted multiple prior convictions. The trial court imposed a total term of three years, consisting of a three-year term for transportation of heroin and concurrent terms for the remaining counts.

Vasser contends the trial court violated Penal Code section 654 by imposing concurrent terms for possession and transportation because all four drug offenses comprised the same “act or omission” under section 654.¹ He argues that the trial court should have imposed only one term for transportation of heroin, and that it should have stayed both terms for possession as well as the term for transportation of methamphetamine. The Attorney General concedes that the trial court should have

¹ Undesignated statutory references are to the Penal Code.

stayed the terms for possession, but he contends the court properly imposed a concurrent term for transportation of methamphetamine.

We accept the Attorney General's concession as to the possession convictions, and we will reverse and remand with instructions to stay the terms imposed on those counts. As to the transportation counts, we conclude substantial evidence supports a finding that Vasser intended to sell the two drugs to separate buyers, such that the two offenses were separately punishable under section 654.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

The prosecution charged Vasser with six counts: Count 1—possession of heroin for sale (Health & Saf. Code, § 11351); count 2—transportation of heroin (Health & Saf. Code, § 11352, subd. (a)); count 3—possession of methamphetamine for sale (Health & Saf. Code, § 11378); count 4—transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)); count 5—driving with a suspended license (Veh. Code, § 14601.1, subd. (a)); and count 6—possession of a switchblade knife (§ 21510). The information further alleged Vasser had suffered five prior strike convictions (§§ 667, subs. (b)-(i), 1170.12) and three prior convictions for violating the Health and Safety Code (Health & Saf. Code, §§ 11370, subd. (a), 11370.2, subd. (c)).

Vasser pleaded no contest to counts 1 through 5 and admitted the alleged prior convictions. The prosecution dismissed count 6, and the trial court granted Vasser's motion to dismiss the strike priors under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 504. The court denied probation and imposed a total term of three years in state prison, equal to the mitigated term of three years for count 2 with a concurrent two-year term for count 1, a concurrent 16-month term for count 3, and a concurrent two-year term for count 4.

B. Facts of the Offenses²

The police approached a car parked in a bus lane and contacted Vasser along with three other passengers. The occupants of the car were told to exit the vehicle and sit on the curb. When the police searched Vasser, he shook his right leg and they found a small black coin purse or pouch on the ground near his feet. Inside the pouch, the police found multiple plastic baggies with methamphetamine and multiple plastic baggies with heroin. There were three separate bags of methamphetamine with a gross weight of seven grams, and four bags of heroin with a gross weight of 15 grams. The testifying officer opined that Vasser possessed the drugs for sale based on the location of the car, the amounts of the drugs, the fact that he had multiple drugs, and cash found on his person.

II. DISCUSSION

Vasser contends the trial court erred by imposing concurrent terms on counts 1, 3, and 4 because the terms should have been stayed under section 654. He argues that the actus reus for possession and transportation consisted of the same act with respect to both the heroin and the methamphetamine offenses. The Attorney General agrees that section 654 precludes punishment for both possession and transportation of the same drug. Accordingly, the Attorney General concedes that the trial court should have stayed the terms for the possession convictions (counts 1 and 3). However, the Attorney General contends section 654 does not preclude separate punishments for the simultaneous transportation of two different substances, such that the trial court properly imposed a term for count 4 (transportation of methamphetamine) concurrent with the principal term on count 2 (transportation of heroin).

A. Legal Principles

Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

² The statement of facts is based on the transcript of the preliminary hearing.

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” This section prohibits multiple punishments for a single physical act that violates different provisions of law. (*People v. Jones* (2012) 54 Cal.4th 350, 358 (*Jones*).) Under this rule, a trial court may not impose concurrent terms for multiple convictions based on the same act; rather, one or more terms must be stayed. (*Id.* at p. 353.)

“Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses.” (*People v. Corpening* (2016) 2 Cal.5th 307, 313 (*Corpening*).) An “act or omission” under section 654 also includes a course of conduct consisting of multiple acts if the defendant acted with a single objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) “Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an ‘act or omission’ may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a ‘single physical act.’ [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single ‘intent and objective’ or multiple intents and objectives.” (*Corpening*, at p. 311.)

“Whether multiple convictions are based upon a single act is determined by examining the facts of the case.” (*People v. Mesa* (2012) 54 Cal.4th 191, 196.) When the facts are undisputed, the application of section 654 raises a question of law we review de novo. (*Corpening, supra*, 2 Cal.5th at p. 312.) However, “[i]ntent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense.” (*People v. Jackson* (2016)

1 Cal.5th 269, 354.) We must accept a trial court’s factual determination that a course of conduct had multiple objectives if the finding is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

B. Section 654 Prohibits Imposition of Concurrent Terms on Counts 1 and 3

The parties agree that section 654 prohibits multiple punishments for both possession of a drug and the transportation of that drug. “[S]ection 654 applies to possession for sale and transportation for sale of the same substance.” (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 610 (*Buchanan*)). This principle follows from *Jones, supra*, 54 Cal.4th 350 (holding that section 654 prohibits multiple punishments for possession of a single firearm.) Accordingly, the parties agree—as do we—that the trial court erred by imposing concurrent terms on each of the possession counts (counts 1 and 3) in addition to imposing terms on the transportation counts.

The parties disagree on whether the court could impose punishments for both the transportation of heroin (count 2) and the transportation of methamphetamine (count 4). Vasser relies on *In re Adams* (1975) 14 Cal.3d 629. Where “different kinds of drugs are simultaneously transported in one, indivisible transaction, with the single intent and objective of delivering them to another person, only one act of illegal transportation occurs.” (*Id.* at p. 632.) That principle was recently reaffirmed in *People v. Chung* (2015) 237 Cal.App.4th 462, 467 (*Chung*) (section 654 prohibits multiple punishments for single act of offering to sell multiple drugs to a single person). Here, Vasser contends he was transporting both the heroin and methamphetamine in the course of a single, indivisible transaction, and he argues that the trial court had no basis to find he was delivering them to more than one person. He points out that both the heroin and methamphetamine were contained within a single black coin purse or pouch.

The Attorney General relies on *People v. Blake* (1998) 68 Cal.App.4th 509 (*Blake*). In *Blake*, the Court of Appeal affirmed the imposition of separate punishments for the simultaneous transportation of methamphetamine and transportation of marijuana

in the same car. The court concluded substantial evidence supported a finding that Blake intended to sell them to different customers. The court relied on the fact that the drugs were stored in separate containers in different parts of the car; the marijuana was packaged in a manner consistent with multiple sales; the amounts of the drugs were consistent with delivery to more than one person; the difference in the drugs suggested they were directed at different buyers; and indicia of multiple sales were found in the form of pay-owe sheets with multiple entries, a scale, a police scanner, and baby wipes. (*Id.* at p. 512.) (See also *Buchanan*, *supra*, 248 Cal.App.4th at p. 612 [affirming separate punishments for transportation of heroin and methamphetamine on ground that defendant was transporting different drugs for different types of drug abusers].) The Attorney General points out that here the drugs were packaged in multiple separate baggies, and the gross weights of the two drugs were consistent with multiple buyers.

Based on the packaging and the amounts of the drugs, we think this case is closer to *Blake* than *Chung*. Vasser was in possession of seven grams of methamphetamine and 15 grams of heroin.³ The methamphetamine was divided into three separate baggies, and the heroin was divided into four separate wrappers. The packaging and amounts provided substantial evidence for the trial court's implied finding that Vasser intended to sell the drugs to multiple buyers. (See *Blake*, *supra*, 68 Cal.App.4th at p. 512.) Furthermore, the court could reasonably conclude Vasser intended to sell the drugs to different buyers based on the distinct nature of the two drugs. (*Buchanan*, *supra*, 248 Cal.App.4th at p. 612.) Accordingly, section 654 did not preclude the imposition of concurrent sentences for the transportation of each drug.

For the reasons above, we will reverse and remand with directions to stay the terms on the possession convictions (counts 1 and 3) but not the term for the transportation of methamphetamine (count 4).

³ The gross weights did not include the black pouch.

III. DISPOSITION

The judgment is reversed, the sentence is vacated, and the matter is remanded. On remand, the trial court shall stay the terms imposed on counts 1 and 3 and resentence Vasser on the remaining counts.

Greenwood, P.J.

WE CONCUR:

Premo, J.

Elia, J.

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